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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 321- 322

JOHN H. CHATZ, TRUSTEE IN BANKRUPTCY OF HOWARD HABERMAN, DOING BUSINESS AS THE CLUB STORE AND MORTON CLOTHIERS, BANKRUPT,

Petitioner,

vs.

ARMOUR PLANT EMPLOYEES CREDIT UNION, A CORPORATION,

Respondent.

JOHN H. CHATZ, TRUSTEE IN BANKRUPTCY OF HOWARD HABERMAN, DOING BUSINESS AS THE CLUB STORE AND MORTON CLOTHIERS, BANKRUPT,

Petitioner,

vs.

ANDREW A. TODD, CHELSEY H. TALLEY AND ARMOUR PLANT EMPLOYEES SERVICE BUREAU, A CORPORATION,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Of Counsel.

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Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your petitioner, John H. Chatz, as Trustee in Bankruptcy of Howard Haberman, doing business as The Club Store and Morton Clothiers, Bankrupt, prays that writs

of certiorari issue to review the judgments of the Circuit Court of Appeals for the Seventh Circuit entered in the above causes, reversing, with directions to dismiss the petitioner's action, the judgment of the United States District Court for the Northern District of Illinois for a total of $105,851.58 for the petitioner and against respondents, based on findings in a trial by the Court without a jury.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 1941-1956) and the dissenting opinion of Judge Major (R. 1956) are reported in 154 F. (2d) 236. The District Court made extensive findings of fact (R. 1598-1616) and conclusions of law (R. 1617-1621), but rendered no opinion.

JURISDICTIONAL STATEMENT.

Jurisdiction is conferred by section 240, of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. Tit. 28, sec. 347 (a)).

The judgments of the Circuit Court of Appeals sought to be reviewed were entered on February 23, 1946 (R. 1956). On March 9, 1946, within the 15 days permitted by its rules, petitioner filed a petition for rehearing (R. 1957) to which respondents filed their answer (R. 2011). On April 24, 1946, the Circuit Court of Appeals entered its orders modifying its opinion and denying the petition for rehearing (R. 2049). This petition is filed within three months thereafter as permitted by Act of February 13, 1925, ch. 229, sec. 8, 43 Stat. 940 (U. S. C. Tit. 28, sec. 350), and *Bowman* v. *Loperena*, 311 U. S. 262, 266; *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144; and *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498.

QUESTIONS PRESENTED.

1. Does Rule 52(a) of the Federal Rules of Civil Procedure, in appeals substituted by statute for writs of error, supersede sections 875, 879, 773 and 861(b), Tit. 28, U. S. C., which on such appeals prohibit reversals for errors in fact, giving the effect of a jury's verdict to the findings of a trial court in a trial to the court without a jury, and limit review to whether special findings of fact support the judgment?

2. Does Rule 52(a), independently of such statutes, permit the Circuit Court of Appeals to set aside special findings of the District Court in a civil action when supported by evidence?

3. Does Rule 52(a) permit a Circuit Court of Appeals, on review of a civil action, to consider as impeached the testimony of a witness whom the District Court did not in the trial before it consider impeached, to disregard other substantial testimony in the record of the same witness, to disregard corroborative testimony, to give the effect of evidence to extra-judicial allegedly contradictory impeaching statements of the witness, to weigh conflicting evidence and to draw inferences contrary to those which the trial court might reasonably draw?

4. Did the bankrupt's submission to the payment of the collections on his accounts to the Credit Union, to liquidate its loans on which he was not liable as guarantor or co-maker, because of respondents' threats that the Service Bureau would not collect out of wage deductions the Bankrupt's installments accounts accepted for collection that were owing by Armour employees and that, if he attempted to effect collections on his accounts by means of his wage assignments, they would interfere with that and thereby stall collections from coming to him for a

month or six weeks or two months so that he could not pay his creditors and would be out of business and would have to go into bankruptcy unless this be done, constitute duress under the laws of the state of Illinois?

5. May the Circuit Court of Appeals reverse a judgment in its entirety with directions to dismiss an action when there are findings, other than the finding set aside, which will support the judgment in whole or in part?

6. Were the findings of the District Court "clearly erroneous" within the meaning of Rule 52(a)?

STATUTES INVOLVED.

The statutes involved are U. S. C., Title 28, sections 225a (Act of February 13, 1925, ch. 229, 43 Stat. 936, amending Judicial Code sec. 128), section 723b and 723c (sections 1 and 2 of Act of June 19, 1934, ch. 651, 48 Stat. 1064), section 730 (Rev. Stat. section 917), section 773 (Act of May 29, 1930, ch. 357, 46 Stat. 486, amending Rev. Stat. section 649), section 861a (Act of January 31, 1928, section 1, ch. 14, 45 Stat. 54), section 861b (Act of April 26, 1928, ch. 440, 45 Stat. 466, amending section 2 of Act of January 31, 1928), section 875 (Rev. Stat. 700), and section 879 (Rev. Stat. section 1011 as amended by Act of February 18, 1875, ch. 80, 18 Stat. 318. Also Act of March 3, 1891, ch. 517, 26 Stat. 826, and Rule 52(a) of the Federal Rules of Civil Procedure.

The pertinent provisions are set forth in the Appendix at pages 26-29.

SUMMARY OF THE MATTER INVOLVED.

Petitioner is the trustee in bankruptcy of Howard Haberman, doing business as The Club Store and Morton Clothiers, bankrupt, having been appointed after the bankrupt's adjudication as such after his failure to effect an arrangement with his creditors under Chapter XI of the Bankruptcy Act.

Petitioner brought a plenary suit in the District Court for the Northern District of Illinois against the respondents, Armour Plant Employees Credit Union, a corporation (herein called "Credit Union" for convenience), Armour Plant Employees Service Bureau, a corporation (herein called "Service Bureau" for convenience), Andrew A. Todd and Chelsey H. Talley, who were directors and officers of both corporations. Petitioner's complaint (R. 2) as amended (R. 1576) to conform to the proof, was an action for only a money judgment and interest against the respondents, and prior to the Federal Rules of Civil Procedure, would have been an action at law.

Recovery was had in the District Court against the Credit Union and the Service Bureau for the $43,297.14 of moneys diverted to payments to the Credit Union under duress and without consideration, the bankrupt not being obligated in any manner for such payments to the Credit Union, which together with $17,362.23 of statutory interest for vexatious delay aggregated $60,659.37.

Recovery was had against the Service Bureau, Todd and Talley for an additional $45,192.21, covering four items, namely the $16,945.53 of continued extra charges deducted after March 1, 1935, pursuant to an agreement to reinstate laid-off employees in Armour's employ and on its payrolls, which agreement was not thereafter performed despite requests; for false and fraudulent collection charges

of $10,076.75 collected from the bankrupt out of proceeds of loans of the Credit Union falsely listed with Armour & Company as collections by the Service Bureau; for the $13,236.64 of moneys admittedly collected after October 1, 1938 on bankrupt's then outstanding accounts not assigned to the respondents; and for the $8,335.32 difference between the cash paid to the bankrupt and the amounts of accounts receivables on sales made after October 1, 1938 discounted with the respondents, whereby they were paying back to the bankrupt only the proceeds of the collections of his own accounts falsely claimed to have been assigned. With statutory interest added thereto and after credit to Todd and Talley for unpaid advances and loans, $45,192.21 was adjudged due from them and the Service Bureau to petitioner.

After a trial lasting five weeks before the Court without a jury (R. 1598), the Court made special findings of fact and entered judgment for petitioner for $60,659.37 against both the Credit Union and the Service Bureau, and for an additional $45,192.21 against Todd, Talley and the Service Bureau (R. 1621). The Circuit Court of Appeals (by a divided court) reversed with directions to dismiss the action.

The bankrupt, Howard Haberman, early in 1934 opened up his own installment credit retail men's ready-made clothing business in Chicago, Illinois, in the vicinity of the plants of Armour & Company, whose employees comprised the greater part of his customers.

The respondents, Todd, Talley and the Service Bureau, were engaged in the business of collecting accounts against Armour & Company employees out of weekly wage deductions made by pre-arrangements with Armour & Company, for which they charged 10% of the collections. For an additional consideration of 10% (later 12½% and 15%) of collections they would agree to have employees reinstated in

Armour's employ and on its payroll, thereby assuring payment in full of the accounts out of continued earnings (R. 106, 109, 110, 1327-8, 1355-6, 323-4, 625-6).

Haberman and the respondents agreed to this arrangement for Haberman's business (R. 110); and for over a year both parties performed, Haberman paying the charges for both services totaling 20%, 22½% and finally 25%, and the respondents procuring the reemployment of many employees (R. 126, 176, 184, 198, 1323, 1358-9).

Also at this time, and to increase the loan business of the Armour Plant Employees Credit Union, Todd and Talley arranged that the Credit Union would make loans to acceptable Armour employees and pay their proceeds to Haberman in payment of the employees' clothing purchases (R. 131), which would in effect be cash sales (R. 1360). Haberman did not guarantee these loans and was not a comaker (R. 209, 1369, 1370) (Finding 28, R. 1606).

When early in 1935 Armour & Company laid off many employees, collections out of wages dropped severely both on Haberman's credit accounts and on the Credit Union's loans. The Credit Union had some $50,000.00 of such accounts then outstanding (R. 152).

Todd and Talley then insisted on applying collections on Haberman's accounts against the Credit Union's delinquent loans. Haberman remonstrated and told Todd if that were done, he would have no funds with which to continue business and would be bankrupt. He demanded they fulfill their reemployment agreement for which they had been paid and what did they expect to do for that money. The response was if he did not stop talking about the deductions from his collections they would cut him off, by which they told him they meant they would not collect his accounts, interfere with his own efforts to effect collections on wage assignments and stall collections from coming to him for a month

or two so that he couldn't pay his creditors and would have to go into bankruptcy (R. 165, 174-5).

"Q. Did Mr. Todd ask you (Haberman) at that time to have the collection of accounts receivable which the Service Bureau then had and which the Service Bureau would get in the future on new sales, both to be used for the payment of these defaulted Credit Union loans?

A. Yes, he did * * * I told Mr. Todd that—in this conversation I told him, well, it looked like he had me and if this is the way he wanted to treat me there was nothing I could do but submit to it.

Q. And did you submit?

A. I did" (R. 166).

The Circuit Court quoted other testimony of the bankrupt (R. 151-2) that when Todd again said they wanted to make deductions out of the Bureau checks to pay the Credit Union and he objected that he hadn't guaranteed those accounts and they were going to keep his money for them and he wouldn't have any money left, Todd said:

"If you object to any of the things we want to do, we are going to cut you off. We will interfere with the collections of your Service Bureau accounts. If you serve any wage assignments down here, we will see to it that we will not hold up these checks. We intend to make you pay for the Credit Union loans" (R. 151).

The Court further quoted that Haberman said he wouldn't have any money for continuing his business to which Todd stated he'd talk with Talley and arrange a large loan and that the next day they presented Haberman with an assignment to Todd and Talley in blank of all his accounts outstanding as of that date in 1935 (Def. Ex. 69; R. 1922), and demanded that if he didn't sign it, they wouldn't give him any money and would be through with him (R. 152) (Finding 30, R. 1607).

The loan was one of $3,000.00 for which the bankrupt gave them his note for $6,000.00 (R. 284). Todd said he was

going to use the difference to pay on the Credit Union defaulted loans (R. 285) although there is no evidence he did. No loans were made thereafter until January, 1936 (R. 286, 288). This the Court below disregarded.

The record discloses that the loan transactions for the entire year of 1935, were as follows: In March, 1935, Todd and Talley twice made cash loans to the bankrupt aggregating $11,292.50 for which they took his notes aggregating $13,678.00 (R. 278). Although no money was paid him, Haberman's note balance in April, 1935, was increased by $1,458.27 for payments allegedly applied by Todd in payment to the Credit Union accounts (R. 280-1). After the addition of interest and credit for payments the note balance was $13,969.41 (R. 283, Pl. Ex. 37, R. 1835). With the addition of the foregoing $6,000.00 note, the note balance became $19,969.41 (R. 264, 284). In August, 1935, it stood at $18,701.76 on which $43.15, at the usurious rate of 12% per annum, was paid monthly as interest (R. 286-7). The balance remained constant until April, 1936 (R. 288), except for a loan made in January, 1936, and paid (R. 288).

On August 16, 1936, bankrupt executed an authorization (R. 1526A) for the deduction of 40% of his collections to be applied against delinquent "M" accounts in the Credit Union, until paid in full with interest. The bankrupt testified no consideration was given to him at the time (R. 436). Todd confesses to a lack of memory (R. 581-2) and Talley testifies it was Haberman's good will gesture (R. 750). Yet the next day Haberman gave them his two signed blank notes, undated, with no amounts and authorizing a confession of judgment against him (R. 290).

With the deductions being made, the bankrupt was pressed for funds, and doubtless to enable the Credit Union to tide over the period required to effect collections from the bankrupt's accounts, Todd and Talley in 1936 and 1937 made usurious loans with cash advances in amounts sub-

stantially less than the amounts of the notes, on which actual advances the interest rate was about 22% (Finding 32, R. 1608).

The total amount deducted from the bankrupt's accounts and paid to the Credit Union was $43,297.14 (Finding 29, R. 1606).

Although no longer performing their reemployment agreement, Todd and Talley continued to deduct the extra charge therefor from collections, meeting objection with a threat to cut the bankrupt off (R. 174-5, 1378-9, 1412). The aggregate of the deducted unearned charges from March 1, 1935 was $16,945.53 (Finding 23, 24, R. 1604).

By October 1, 1938, the Credit Union loans had been liquidated. Despite previous assurance of waiting until then to adjust matters, Todd and Talley imposed a new arrangement upon the bankrupt, which they pleaded, by way of settlement as a defense (R. 45, 46), but failed to maintain (R. 1608-9; 1618). At that time Haberman had $50,-235.57 of Armour employee accounts at the Service Bureau for collection and some $40,000.00 additional accounts from other customers. The respondents claimed (R. 858) ownership of all by virtue of the assignment made in 1935 (which expressly assigned only accounts as of that earlier date and did not include subsequent accounts). They demanded of the bankrupt he give them his note for $10,670.00, at which they valued the non-Armour accounts then claimed, stating they would cancel all of his other note indebtedness to them, that as to any new accounts for sales made thereafter to customers, they would discount them at 65% but would pay him therefor weekly only an amount equal to the collections from the old accounts. They also insisted that Mr. Packer, their auditor, be in the bankrupt's store and that the bankrupt's auditor be, and he was, discharged. The bankrupt's notes were never cancelled or surrendered to him by the respondents, and instead have been sued on in their counter-

claim. All evidences of the customer's indebtedness, namely, notes and wage assignments, were at all times in the bankrupt's possession and premises and were turned over to the petitioner as his Trustee in Bankruptcy (R. 1608-10).

The bankrupt could not function under such a situation and attempted, despite threats (R. 237-8) of jail and accusations of criminal violations, to discount the accounts and new accounts claimed by the respondents to have been assigned to them. With the situation becoming desperate within the next two months, bankrupt consulted an attorney whom he advised of all the facts as he testified to, but who, under the pressure of haste and within the limited time available (R. 392), prepared a complaint (R. 1851-67) to recover in excess of $85,000.00 predicated on the theory that all deductions by respondents were without consideration and were disguised charges for loans and recoverable usury. A meeting with the respondents was held and a copy of the proposed complaint delivered to them. Within a few days (in January, 1939) the respondents met with the bankrupt and proposed to him that if he would dismiss his counsel and would execute a retraction in the form which they presented, they would pay his creditors in full (R. 240) at the rate of $1,000.00 a month (R. 298) and enter into a new business with him of which he would have one-third of the profits (R. 240-1). Upon this assurance, the bankrupt signed the retraction telling respondents that he signed it knowing it to be false and that they knew such also to be the case (R. 240, 242).

After five months of payments to bankrupt's creditors, the respondents discontinued, telling the bankrupt that he should settle with his creditors and have them reduce their claims (R. 299). The bankrupt, thereupon, in July, 1939, instituted proceedings under Chapter XI, and after failure (R. 300) of the arrangement negotiations was adjudicated

bankrupt. Petitioner was appointed Trustee in Bankruptcy.

Petitioner instituted this plenary suit in the District Court and obtained a judgment against the respondents who filed separate appeals to the Circuit Court of Appeals for the Seventh Circuit, with the result as above stated.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The scope of the review on appeals, substituted by statute for writs of error, from judgments based on findings of trial courts in trials without a jury in civil actions, which but for the Federal Rules of Civil Procedure would be actions at law, involves the interpretation of Rule 52 (a) and conflicting statutes governing relief on such appeals, and is an important question not heretofore determined by this Court, and should be.

2. The interpretation and application of Rule 52(a) by the Circuit Court of Appeals below is in conflict with the decisions of Circuit Courts of Appeals for other circuits.

3. The Circuit Court of Appeals has decided a question of the Illinois law of duress in conflict with applicable local decisions.

4. The Circuit Court of Appeals has so far departed from the accepted or usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision.

WHEREFORE, it is prayed that writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit should be granted to the end that these causes may be reviewed and determined by this Honorable Court and that the judgments of the United States Circuit Court of Appeals for the Seventh Circuit may be reversed, and that your

petitioner may have such other and further relief as may be meet and just.

JOHN H. CHATZ, trustee in bankruptcy of Howard Haberman, doing business as The Club Store and Morton Clothiers, Bankrupt,

Petitioner,

By JOSEPH ROSENBAUM,

Counsel for Petitioner.

HARRY H. RUSKIN,
JEROME S. WALD,
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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

STATEMENT OF THE CASE.

The reference to the opinion of the Court below and the material facts as to the origin and history of the case, jurisdiction and the issues presented have been stated in the preceding Petition.

SPECIFICATION OF ERRORS TO BE URGED.

(1) The Circuit Court of Appeals erred in reversing the judgment of the District Court with directions to dismiss Petitioner's action.

(2) The Circuit Court of Appeals erred in not affirming the judgment of the District Court, or, in the alternative, erred in not reversing the judgment of the District Court in so far as it includes allowances for interest and in not affirming the findings of the trial court and the judgment in all other respects.

ARGUMENT.

(A) The Scope of the Review on Appeals, Substituted by Statute for Writs of Error, from Judgments Based on Findings of Trial Courts in Trials Without a Jury in Civil Actions, Which But for the Federal Rules of Civil Procedure Would Be Actions at Law, Involves the Interpretation of Rule 52(a) and Conflicting Statutes Governing Relief on Such Appeals, and Is an Important Question Not Heretofore Determined by This Court, and Should Be.

The limited scope of a writ of error, including the limitations and prohibitions of U.S.C., Tit. 28, sections 875 and 879, still exists in appeals substituted therefor by sections 861a and 861b.

The Circuit Courts of Appeals are directed, by section 879, *not* to reverse for errors in fact; and by section 875, the District Courts' findings are given the effect of a jury's verdict, except that (as in this case) where there are special findings of fact, the Circuit Courts are authorized to determine whether they support the judgment.

State Farm Ins. Co. v. *Coughran,* 303 U. S. 485; *Stanley* v. *Supervisors of Albany,* 121 U. S. 535, 547. The original statute (Act of March 3, 1865, Ch. 86, 13 Stat. 501; R. S. Secs. 649, 700), so codified, was essential for appellate review in non-jury law cases, as, prior to that time, trials by a District Court without a jury were not judicial acts, but only arbitrations and, the findings, therefore, not reviewable (*Campbell* v. *Boyreau,* 21 How. 223, 226-7).

The Circuit Court of Appeals below, however, ridding itself of this restraint by its definition of "clearly erroneous" in Rule 52(a) of the Federal Rules of Civil Procedure, reversed for errors in fact in passing on the sufficiency and weight of the evidence.

The Rules, as provided in Rule 1, only "cover the procedure in the District Courts of the United States * * *." They are authorized by Section 723c of Title 28, U. S. C., which permitted this court to "unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both." The rules prescribed for cases in equity are authorized by Section 730 and those "in actions at law" by Section 723b, Title 28, U.S.C., which permit such rules *only for the District Courts;* and it is only such rules of which Section 723c authorized a union.

May rule 52(a), prescribed for the District Courts, supersede the Acts of Congress which limit the right of the Circuit Courts of Appeals to review, and the scope of the review in such courts of, appeals substituted for writs of error? This question has never been judicially determined and is one of such vital importance as to justify this Court's assumption of jurisdiction to establish incontrovertibly the limit and scope of Federal Appellate jurisdiction and practice. Compare: *Leishman* v. *Associated Wholesale Electric Co.,* 318 U. S. 203, 205.

(B) The Interpretation and Application of Rule 52(a) by the Circuit Court of Appeals Below Is in Conflict with the Decisions of Circuit Courts of Appeals for Other Circuits.

The Circuit Court of Appeals below, by weighing the evidence and passing upon the credibility of the witnesses under the authority of Rule 52(a) as defined by it, acted in conflict with the decisions in other Circuits, which, under the same Rule, permit only a review of whether there be evidence to support the findings. See: in the Fifth Circuit, *Richardson* v. *U. S.*, 145 F. (2d) 764; *U. S. Guarantee Co.* v. *Colonial Oil Co.*, 145 F. (2d) 496, 500, and *Ake* v. *Chancey*, 149 F. (2d) 310; in the Tenth Circuit, *Kansas City Public Service Co.* v. *McMullin*, 142 F. (2d) 116, and *Federal Deposit Insurance Corp.* v. *Deaton*, 105 F. (2d) 677; and in the Third Circuit, *Floridin Co.* v. *Attapulgus Clay Co.*, 125 F. (2d) 669, 670, and *Plack* v. *Baumer*, 121 F. (2d) 676, 678, Compare: *Corbett* v. *Halliwell*, 123 F. (2d) 331, in the Second Circuit.

That the majority of the court below exceeded such limit in its review is clearly revealed by the dissenting opinion (R. 1956) that, "if this court were the trier of the facts, I would agree with the persuasive reasoning of the opinion that the case should be decided against the plaintiff. *I am unconvinced, however, that the findings of the trial court are without substantial support.*" (Italics ours.)

(C) The Circuit Court of Appeals Has Decided a Question of the Illinois Law of Duress in Conflict with Applicable Local Decisions.

The court below obviously misapplied the local law of Illinois, in which state all of the transactions between the bankrupt and the respondents had occurred. *Bryant* v. *Swafford Bros.*, 214 U. S. 279, 290-1; *Security Warehousing Co.* v. *Hand*, 206 U. S. 415, 423.

The only citations relied on by the Circuit Court were of Federal cases. The law of Illinois on the subject of actionable duress is clearly stated and applied in *Pemberton* v. *Williams*, 87 Ill. 15, 18; *Illinois Merchants Trust Co.* v. *Harvey*, 335 Ill. 284, 289-90; *Slade* v. *Slade*, 310 Ill. App. 77; *Rees* v. *Schmits*, 164 Ill. App. 250; *Cook* v. *Wolf*, 296 Ill. 27, 39; *Harris* v. *Flack*, 289 Ill. 222, and *Pittsburgh Steel Co.* v. *Hollingshead & Blei*, 202 Ill. App. 177.

Bankrupt was in no way liable to the Credit Union for the funds it had loaned to its respective members. The collections of his accounts were paid to the Credit Union over his objection and upon threats which the respondents had no right to make or enforce. They had no right to interfere with his independent collection from the employer on wage assignments. Realizing that resistance to the respondents' demands would lead only to his bankruptcy, Haberman submitted, objecting throughout the time. Loan of moneys relied on by the Court below could not negative the existence of duress. The only loan of money which the respondents could have made for the assignment in June, 1935, was actually a note for $6,000 for which only $3,000 was paid to the Bankrupt. It was represented that the balance would be paid to the Credit Union, although the evidence does not show that the respondents ever did. Loans could not have been offered or bargained for as consideration for the payments to the Credit Union, as none were made thereafter for some seven months.

Resistance at any time risked bankruptcy. When Haberman, in desperation, was finally obliged to engage an attorney, and respondents warded off suit by making periodic payments to his creditors, bankruptcy followed within two weeks after they ceased such payments.

Obviously the trial court and the dissenting judge were of the view that under the law of Illinois there was duress, and this court should not permit the majority view to bring confusion into the state of the Illinois law on the subject.

(D) The Circuit Court of Appeals Has So Far Departed from the Accepted or Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

1. On the duress, the Court below singled out only finding 46 and the written authorization of August 16, 1935, quoted at length the bankrupt's testimony as it appeared on pages 151-2 of the transcript, which it preceded with the comment that it is "the only testimony tending to establish *duress in the execution of this agreement,*" (italics ours) and concluded (with citations of federal cases only) that "there is no evidentiary support for a finding of duress."

Obviously, the Court below was under a duty to consider *all* the findings (27, 28, 29, 30, 31, 50 and 51 as well as 46) bearing on the duress in the respondents' *payments* to the Credit Union of the amounts deducted from the bankrupt's collections. Singling out one finding, alone immaterial, does not detract from a judgment which remains supported by other fact findings; and that a document, admittedly unsupported by any consideration at the time of its execution, is not in and of itself determinative that the deducted

collections were not diverted to the Credit Union under duress of the bankrupt.

Nor did the Court below consider whether there were any inferences which it would be under a duty reasonably to draw from the evidence in support of all findings in addition to Finding 46, and judgment of the trial court.

In quoting, as it did from Haberman's testimony, the court ignored his testimony at pages 164-5, 174-5, and 436 of the transcript. It overlooked Todd's confessed entire lack of memory (R. 581) and Talley's lame story (R. 750-1) on the subject of duress. It overlooked Haberman's testimony of his repeated objections and the respondents' responses that if he did not quit complaining they would "cut him off." It overlooked that the only loan at the time of the conversation in June, 1935, was one of $3,000 cash advanced in exchange for his $6,000 note and the uncontradicted representation that they would pay the other $3,000 to the Credit Union, of which payment there is no evidence. It overlooked that there were no other loans thereafter until January, 1936 and that admittedly nothing was given in exchange in August, 1935, for the authorization for payments to the Credit Union. It overlooked respondents' high-handed actions in their unproved settlement of October, 1938, and false claim of ownership of accounts receivable by virtue of an assignment made in 1935 expressly assigning only accounts of that earlier date, and their threats of criminal prosecution for plaintiff's disregard of the assignment, and completely overlooked the power of usurious creditors over a debtor in their clutches never daring to act independently for fear of inevitable bankruptcy from their interferences and delay in reprisal against his personal efforts at collection of his own accounts.

The alleged documents, notes and retractions were executed under circumstances of the continuing duress existing

between the parties, with bankruptcy at all times and ultimately the only alternative. To assert that, being admittedly executed, they are unchanging evidence of their content and therefore evidence of the absence of duress is to state a *non sequitur* and only to draw an inference contrary to one which was primarily within the province of the trial court reasonably to draw.

2. The alleged inconsistent statements of the bankrupt (satisfactorily explained to the trial court) were made before the referee and *after* the intervention of bankruptcy and were not admissions binding on the petitioner as trustee in bankruptcy. (*Burke* v. *National Liberty Ins. Co. of America*, 212 App. Div. 738, 209 N. Y. Supp. 608, and compare *In re Weissman*, C. C. A. 2, 19 F. (2d) 769, 772, *Brock* v. *Schradsky*, 6 Colo. App. 402, 404, and Bankruptcy Act, section 70A, U. S. C. Title 11, ch. 7, sec. 110a.)

Although *not* evidence of their subject matter (*Southern Railway Co.* v. *Gray*, 241 U. S. 333, *Southern Pacific Co.* v. *Kauffman*, C. C. A. 9, 50 F. (2d) 159, 161, and compare *Waldron* v. *Waldron*, 156 U. S. 361, 381), they were stressed by the court below.

They were admissible for purposes only of impeachment (which was unsuccessful), a matter hitherto exclusively within the province of the trial court. (*Lumbermen's Mutual Casualty Co.* v. *McIver*, C. C. A. 9, 110 F. (2d) 323, 325; *Bowen* v. *Cote*, C. C. A. 1, 69 F. (2d) 136, 137, 138; *U. S.* v. *Tyrakowski*, C. C. A. 7, 50 F. (2d) 766, 770; and *Johnson* v. *Ellmers*, C. C. A. 6, 295 Fed. 685.

"Clearly erroneous" in Rule 52(a) with its limitations of regard for the trial court's opportunity to judge of the credibility of the witnesses has not yet been defined much beyond the actual words of the rule. The rule does not serve as a warrant for a retrial; and we urge the need for this Court to fix its limit and scope on review at something

less than what the majority of the court below have attempted under it in this case.

3. The opinion of the majority of the court below sets forth the five items comprising the total judgment. The opinion orders a dismissal of the action, while disposing of only two, namely, the charges for the assurance agreement for the reinstatement of employees in Armour's employ and on its payroll, and the collections of the bankrupt diverted to the Credit Union. The three remaining items, included in the judgment and aggregating, exclusive of interest, $31,648.71, exceed the $20,226.79 of credits found to be due Todd and Talley by $11,421. 92, and with interest by $21,780.04. There is nothing in the opinion which discussess them, namely: the finding that Todd, Talley and the Bureau deducted $10,076.75 for alleged collection services in connection with Credit Union loans collected directly from Armour and Company, when such services were neither necessary nor performed; the finding that they admittedly (R. 46) collected $13,236.64 after October 1, 1938, on Haberman's accounts receivable which they claimed under an unproved settlement and under the assignment executed in 1935 which by its terms assigned only accounts as of that earlier date; and the finding that they received from Haberman new accounts receivable from sales made by him after October 1, 1938, in an amount exceeding by $8,335.32 the cash they paid him and which was no more than the proceeds of the collections of his very own accounts.

Nevertheless, the Court below reversed the entire judgment with directions to *dismiss the action.*

The incongruous result of this litigation, also justifying this court's review for the pronouncement of an exemplary rule, is that four judges have considered this case and are equally divided on the sufficiency of the evidence; and, yet,

the experienced and respected judge who actually heard and saw the witnesses and was the only one in the position to judge of their credibility and the true worth of their testimony, is overruled.

The case assumes greater importance, when it is considered that trustees in bankruptcy are too often confronted with transactions where the participants or dominant personalities have sought to create appearances conflicting with later discovered truth. To permit disregard of a trial court's opportunities of determining from the conduct and demeanor of the witnesses who is telling the truth and *whether it is being told in court at the trial,* despite explained extra-judicial inconsistent statements motivated at the time by selfish interests hostile to those of the trustee, is to place an unbearably difficult burden on trustees in bankruptcy seeking to effect recoveries in behalf of bankrupt estates in the administration of their official duties.

Conclusion.

It is respectfully submitted that review by this court is most essential, as under existing statutes the scope of review is for errors only of law, and is not enlarged by Rule 52a for correction of errors in fact. There is ample evidence to support a judgment and findings based on duress under the law of Illinois, if correctly determined. The application and interpretation of Rule 52a goes far beyond what can be the limitations and true meaning of the rule, and is in conflict with the decisions of other circuits. Resolving the conflict between the rule and statutes on federal appellate practice, resolving the conflict between the circuits, exposition of the limits of Rule 52a, and elim-

ination of the doubt cast on the Illinois law of actionable duress urgently require a review by this court; and the writs of certiorari should be granted.

Respectfully submitted,

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HARRY H. RUSKIN,
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Of Counsel.

APPENDIX.

(U. S. C. Title 28, sec. 723b and 723c), Act of June 19, 1934, Ch. 651, 48 Stat. 1064.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law.

SEC. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

(U. S. C. Title 28, sec. 730), Revised Statutes, sec. 917.

"The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate

the whole practice, to be used, in suits in equity or admiralty, by the circuit and district courts."

(U. S. C. Title 28, sec. 861a), Act of January 31, 1928, Ch. 14, 45 Stat. 54.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

(U. S. C. Title 28, sec. 861b), Act of April 26, 1928, ch. 440, 45 Stat. 466.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of an Act entitled, 'An Act in reference to writs of error,' approved January 31, 1928, Public Numbered 10, Seventieth Congress, be, and it is hereby, amended to read as follows:

> 'Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate shall be applicable to the appeal which the preceding section substitutes for a writ of error.' "

(U. S. C. Title 28, sec. 875), U. S. Revised Statutes, sec. 700.

"When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or on appeal; and

when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

(U. S. C. Title 28, sec. 879), U. S. Revised Statutes, sec. 1011, as amended by Act of February 18, 1875, ch. 80, 18 Stat. 318.

"There shall be no reversal in the Supreme Court or in a circuit court upon a writ of error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."

(U. S. C. Title 28, sec. 773), Act of May 29, 1930, ch. 357, 46 Stat. 486.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 649 of the Revised Statutes, as amended (section 773, title 28, United States Code), be, and the same is hereby amended to read as follows:

> 'Sec. 649. Issues of fact in civil cases in any district court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, agree to waive a jury by a stipulation in writing filed with the clerk or by an oral stipulation made in open court and entered in the record. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.' "

(U. S. C. Title 28, sec. 225a), Act of February 13, 1925, ch. 229, 43 Stat. 936.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 128 * * * of the Judicial Code as now

existing be, and they are severally, amended and reenacted to read as follows:

> 'Sec. 128(a). The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—
>
> First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 238. * * *' "

Act of March 3, 1891, ch. 517, 26 Stat. 826.

"Sec. 2. That there is hereby created in each circuit a circuit court of appeals, * * * which shall be a court of record with appellate jurisdiction, as is hereafter limited and established. * * *

"Sec. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court * * * in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, * * *

"Sec. 11. * * * And all provisions in law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals, and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively."

Federal Rules of Civil Procedure.

Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 321, 322

JOHN H. CHATZ, TRUSTEE IN BANKRUPTCY OF HOWARD HABERMAN, DOING BUSINESS AS THE CLUB STORE AND MORTON CLOTHIERS, BANKRUPT,

Petitioner,

vs.

ARMOUR PLANT EMPLOYEES CREDIT UNION, A CORPORATION,

Respondent.

JOHN H. CHATZ, TRUSTEE IN BANKRUPTCY OF HOWARD HABERMAN, DOING BUSINESS AS THE CLUB STORE AND MORTON CLOTHIERS, BANKRUPT,

Petitioner,

vs.

ANDREW A. TODD, CHELSEY H. TALLEY AND ARMOUR PLANT EMPLOYEES SERVICE BUREAU, A CORPORATION,

Respondents.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

The first two of the reasons advanced by petitioner for the grant of certiorari are virtually conceded upon analysis of respondents' brief.

It is not contended that the trial court's findings do not support its judgment. Hence, unless Rule 52(a) (of the rules for district courts) impliedly repealed the statutes (directed to circuit courts of appeals) prohibiting reversals for errors in fact, giving the trial court's findings the effect of a jury's verdict, and limiting the review to whether the findings support the judgment, the court below clearly exceeded its authority. Respondents recognize the conflict between the rule and the statutes on appeal, but resolve it summarily in favor of an implied repeal of the latter. The question is too important to be disposed of in such manner.

The conflict between the circuit courts of appeals since the adoption of Rule 52(a) on the extent of their review (independently of the statutes governing appeals substituted for writs of error) is most evident in respondents' quotations, but the vital distinction between limiting the review to a determination only of the existence of substantial evidence to support the findings as against a determination also of the clear weight of the evidence were lost sight of. The cleavage among the circuits on this important aspect of federal appellate practice is indisputably manifest in the closing sentence of the opinion in *Federal Deposit Insurance Corp.* v. *Deatton,* (C. C. A., 10th circuit) 105 F. (2d) 677, 680:

> "All such findings on the part of the trial court being supported by substantial evidence has the force and effect as if made through the verdict of a jury under proper instructions on the issues and may not be disturbed here on appeal."

We briefly refute respondents' principal points and assertions of our inaccuracies, with a view to pointing out that the questions created by the manner of the review by the court below are real, not feigned, and warrant this court's review.

1. That Rule 52(a) was adopted by this court, has the force of law, and could not take effect until reported to Congress by the attorney general at the beginning of a regular session and until after its close, do not alter the situation. Whether Congress acted as it did, or itself had set up rules *for district courts* verbatim in a statute, Rule 52(a) would nonetheless require construction, and, however interpreted, would pose the questions now submitted as reasons for the grant of certiorari in the case at bar.

The cited note of the Advisory Committee on Rules (House document No. 588, 75th Congress, 3rd Session) was prefaced with an introductory statement (p. vii), the last paragraph of which significantly states:

> "Statements in the notes about the present state of the law, or the extent to which existing statutes have been superseded by or incorporated in the rules, should be taken only as suggestions and guides to source materials. Such statements, and any other statements in the notes as to the purpose or effect of the rules, can have no greater force than the reasons which may be adduced to support them. The notes are not part of the rules, and the Supreme Court has not approved or otherwise assumed responsibility for them. They have no official sanction, and can have no controlling weight with the courts, when applying the rules in litigated cases."

Obviously, it is not contended that the question has ever been decided; and we note that this Court has before invalidated rules of court interfering with litigants' rights under statutes; *Davidson Marble Co.* v. *Gibson*, 213 U. S. 10, *Washington-Southern Navigation Co.* v. *Baltimore & Philadelphia Steamboat Co.*, 263 U. S. 621, 635-6.

2. Petitioner's action was one for a money judgment and in substance one which prior to the rules would have been an action at law. It is no argument, as respondents urge,

that prior to the rules petitioner would have been obliged to bring several actions at law and not a joint action for lack of a joint contractual obligation. See: *Mutual Life Insurance Co.* v. *Hillmon*, 145 U. S. 285, and *Baltimore & O. S. W. R. Co.* v. *U. S.*, 220 U. S. 94, 106.

The reference to the part of the judgment cancelling the past due notes (R. 621) is to surplusage, and not equitable relief. Judgment was given to *respondents* upon *their* counterclaim on *these* notes, the amount was credited against petitioner's claim, and the notes therefore were adjudged paid and satisfied. The direction to deliver them up for cancellation was surplusage, as the district court gave respondents their full relief at law by set-off of their pleaded counterclaim.

That the pleadings and practice are in conformity with existing rules does not detract from substance. The record is replete with instances where respondents attributed to petitioner's suit the character of an action at law. The complaint as amended prays only for a money judgment (R. 1580-1). Respondents, objecting to the amendment, stated that it changed the action to one at law (R. 1592). Respondents' motion for rehearing asserts that the complaint as amended had become "in its nature a law action" (R. 1637). Point III of their motion to dismiss the complaint prior to amendment stated it "is not a subject of equity" (R. 19). Their reply points out that petitioner's counsel did not dispute their point that the complaint was not a subject of equity (R. 30). The court at the trial regarded the parties' audit reports of what was due and the objections thereto as pleadings (R. 975). While, at the conclusion of petitioner's evidence, respondents moved for dismissal (R. 1563-5), the court's order denied "their motion for a finding in their favor" (R. 1566). The court's findings of fact commences that the case came on for trial and hear-

ing before the court "sitting without a jury" (R. 1598). The judgment recites that the case "came on to be heard for trial without a jury" (R. 1620). The relief granted to petitioner was only a money judgment (R. 1621). The whole course of the action was in substance one at law. See: *Buzard* v. *Houston*, 119 U. S. 347; *U. S.* v. *Bitter Root Co.*, 200 U. S. 451, 471-3; *Ex parte Peterson*, 253 U. S. 300; and *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379.

As pointed out in petitioner's brief the circuit court of appeals was limited by statutes expressly directed to *its* jurisdiction and authority to review for errors of law alone, was forbidden to reverse for errors of fact, and could only determine whether the findings supported the judgment. Independently of these statutes, it is the view in the Third, Fifth, Ninth and Tenth Circuits, in their interpretation and application of Rule 52(a), that they may ascertain whether the findings are supported by substantial evidence, but they may not, as did the court below and the cases in the eighth circuit, go farther and determine where the weight of the evidence in their judgment lay. The dissenting judge below clearly recognized the distinction and was for affirmance because the judgment and findings of the trial court were in his view supported by substantial evidence.

3. Respondents say the court below found no substantial evidence in support of *any* findings of duress.

The majority mentioned duress four times. *Three* times in its opinion the majority pointed out that the duress which it considered *was with respect only* to the "agreement" of August 16, 1935 (R. 1947, 1948). Its conclusion, the fourth and last mention of duress, was thereby limited. It did not review or purport to review other findings or other evidence of duress in the record.

What is called an "agreement", as quoted in the opinion, is a written authorization to divert and pay to the Credit Union (to whom the bankrupt was not obligated) collections made from the bankrupt's own accounts. It was no more, and had no greater efficacy than the bankrupt's similar oral statements to respondents on other compulsory occasions clearly established in the record. This document in and of itself was no agreement, deed or assignment. There is not one word in it about what it was given for, what respondents were to do in exchange for it, or what effect was to be given the payments made to the Credit Union pursuant to its purported authority.

For this "agreement" (authorization) there was no consideration, with all due respect to the majority of the court below. We gave citations to the record. Respondents did not point to any others or assert that ours were not correct. Todd doesn't remember the circumstances other than that the document was brought to him by the bankrupt (R. 581-2). Talley's only testimony about it (R. 750-1) contains not one word that it was given for anything,—certainly not for any of the matters mentioned by the majority below. The bankrupt said he received no consideration (R. 436).

Loans could not possibly have been a consideration for this "agreement" (authorization), as we demonstrated that none were made to the bankrupt after June, 1935, until January, 1936. The finding (No. 27, R. 1605) which respondents cite of loans "as hereinafter set forth" is not inconsistent, as the subsequent reference, finding 32 (R. 1608), was that the loans were made "from time to time between March, 1935, and October, 1938." The note signed on August 17, 1935, as shown by respondents' own record reference (R. 290) was on that day signed *in blank with no amount* stated in it and was *not* for a loan.

Its amount ($8,600.88), inserted at a later time, was only a note balance; and the conversation at that time was only for the payment of usurious interest at $43.15 per *week* (R. 286). It is obvious that only usury was the motive and consideration for that note,—nothing else.

The dissenting judge felt that there was substantial supporting evidence for findings of duress (not limited to the authorization singled out by the majority); and it is unseemly that the majority draw only an inference that "bankrupt paid liberally" (R. 1944) in preference to the duress found by the trial court. We have urged not only that the court below may not reverse for error in fact, but that Rule 52(a), independently of the statutes on appeal, does not permit a reviewing court to ignore other findings which would support the judgment and to disregard other substantial evidence in the record and the reasonable inferences therefrom to support such findings and the judgment.

4. It has not been, and cannot be, denied that the majority of the court below failed to cite any Illinois cases on the subject of duress, and indeed, frankly stated that its reasons need not be given or discussed.

There can also be no other conclusion but that the dissenting judge upheld the view that duress within the meaning of the Illinois law was substantially proved. Had he agreed with the majority on the question of law, he could not have been of the opinion to accept the trial court's findings as supported by substantial evidence and affirm (except for interest), as his opinion clearly states.

It is strange indeed that with the wealth of cases cited by respondents in their brief, not one is referred to by the majority of the court below. These cases hold that payments of money voluntarily made under mistake of law or in satisfaction of disputed claims which require no hasty action,

and for the litigation of which adequate legal remedies, if desired to be pursued, are available without risk of real injury, and which, *therefore,* do not affect the will, are not made under duress. Those cases, however, which do discuss moral and business duress recognize that such duress is actionable in Illinois.

No one prior to the decision of the majority below would have believed that there was no moral and business duress, where, as here, the respondents' position over the bankrupt was continuously one of overwhelming dominance, where the bankrupt's installment business depended upon weekly collections in small amounts from customers who were largely employees of Armour and Company, where resort to their wages was had through their orders for weekly wage deductions directed, delivered to and accepted by respondents,—and none others,—where respondents' sudden refusal to collect wages by the orders would invalidate them, where the bankrupt's only recourse was for himself to collect on wage assignments, and where the respondents threatened that they would interfere with such collection if attempted and would see that checks due employees would not be withheld so that bankrupt's collections would be so far delayed that his creditors would then be after him and bankruptcy would inevitably follow, unless he submitted to their diversion of the collections from his own accounts to the Credit Union to whom he was not at all obligated or indebted. The duress was a continuing one and the fear of being forced into bankruptcy so great that the bankrupt's efforts were limited to futile objection. Suit would have precipitated what he was striving to avoid,—an unwarranted and threatened interference with his collections upon which the continued existence of his business depended and which in but a short time (less than what suit would entail) would have spelled

his ruin. There is no analogy to cited cases to set aside deeds, as here only money (for which bankrupt received nothing in return) was sought to be recovered from those who had received it, and in an amount in excess of the claim against the bankrupt. Suit was timely at any time within the period of the Statute of Limitations the plea of which respondents unsuccessfully interposed.

However, in the light of the opinion of the majority of the court below, the Illinois doctrine of moral and business duress is cast in doubt.

Counsel had concluded their argument with the assertion of the amount of the bankrupt's indebtedness, omitting to state that it was the indebtedness owing in January, 1939, and not the amount of the indebtedness allowed in the bankruptcy court. Whether the funds recovered will be more than sufficient to pay the indebtedness of creditors, together with interest in the intervening period, does not detract from petitioner's duty as trustee in bankruptcy to effect collection in full of his cause of action, and certainly does not authorize deviation from proper limits of review.

Conclusion.

It is respectfully submitted that the reasons urged in the petition warrant the grant of writs of certiorari, that duress was proved under the law of Illinois, if correctly interpreted, that the court below despite Rule 52(a) was not authorized by the acts of Congress governing appeals in the circuit courts of appeals to review or reverse for alleged errors in fact, that Rule 52(a) is in need of definition, and that the lack of unanimity among the judges in the court below of the scope of the rule on review is but illustrative of the larger conflict between the circuits which this court, for the sake of uniform and correct appellate

practice in all the circuit courts of appeals, should resolve.

Respectfully submitted,

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Counsel for petitioner.

HARRY H. RUSKIN,
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Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

NOS. 321, 322.

JOHN H. CHATZ, Trustee in Bankruptcy of Howard Haberman, Doing Business as the Club Store, and Morton Clothiers, Bankrupt,

Petitioner,

vs.

ARMOUR PLANT EMPLOYEES CREDIT UNION, a corporation,

Respondent.

JOHN H. CHATZ, Trustee in Bankruptcy of Howard Haberman, Doing Business as the Club Store, and Morton Clothiers, Bankrupt,

Petitioner,

vs.

ANDREW A. TODD, CHELSEY H. TALLEY and ARMOUR PLANT EMPLOYEES SERVICE BUREAU, a corporation,

Respondents.

ANSWERS AND BRIEFS OF RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

NOS. 321, 322.

JOHN H. CHATZ, Trustee in Bankruptcy of Howard Haberman, Doing Business as the Club Store, and Morton Clothiers, Bankrupt,

Petitioner,

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ARMOUR PLANT EMPLOYEES CREDIT UNION, a corporation,

Respondent.

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Respondents.

ANSWERS AND BRIEFS OF RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Decision Below.

The opinion of the United States Circuit Court of Appeals, for the Seventh Circuit, is reported at 154 F. (2d) 236.

Questions Presented.

Counsel for petitioner in their statement of what questions are here presented apparently contend as follows:

1. The Rules of Civil Procedure prescribed by this Court under the authority of the Act of June 19, 1934, Ch. 651, 48 Stat. 1064 (which authorized this Court to unite the general rules for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both), only apply to the district courts of the United States, and do not apply to circuit courts of appeal, and, therefore, Rule 52 (a) which prescribes "that findings of fact shall not be set aside unless clearly erroneous" is invalid.

2. That while this Court is authorized by statute to prescribe rules by which there shall be only one form of action in civil actions in the district courts, that the circuit courts of appeal are bound by statutes which prescribe a two form procedure in civil actions.

3. That circuit courts of appeal being bound by a two form procedure in civil actions, such courts must determine whether the one form procedure in a district court was an action at law or in equity and apply the law with reference to procedure as it was before the Federal Rules of Civil Procedure came into effect.

4. That the present action although originally an action in equity became an action at law because of an amendment made after the hearing of the cause had been completed.

5. That although the Circuit Court of Appeals did have the power to reverse where there was no record evidence to sustain a finding of the District Court, that in the case of the "assurance agreement" as to Todd and Talley, the Circuit Court of Appeals had no power to reverse where

he finding of the District Court was clearly erroneous, ›ecause there was some oral evidence to sustain the find- ng although the Circuit Court of Appeals held that such ›ral evidence was clearly negatived by all of the docu- nentary evidence in the case.

6. That if Rule 52 (a) is valid and the Circuit Court ›f Appeals had the power to reverse the finding of the District Court on the question of duress, that the Circuit Court of Appeals decided such question contrary to the ocal law in Illinois. The statement of counsel under para- graph 4 as to the facts (p. 3 of petition), is absolutely inaccurate. (See pp. 2029-2032 of Record.)

7. That if Rule 52 (a) is valid the findings of the Dis- trict Court were not clearly erroneous.

Answer to Incorrect Statements Made by Counsel Under Heading "Summary of the Matter Involved".

Under their heading "Summary of the Matter Involved" counsel for petitioner have made a number of incorrect and misleading statements which we correct as follows:

1. Counsel state on page 5 of their petition that the complaint as amended was an action for only a money judgment against the respondents, and prior to the Fed- eral Rules of Civil Procedure would have been an action at law.

Although the question of whether the action of petitioner in the District Court was an action at law or in equity, only becomes material in the event that this Court should consider that Rule 52 (a) is invalid, yet if such Rule is invalid, we maintain that the action of the petitioner the District Court was one in equity and not at law. Our reasons for making this statement are hereinafter set forth under our Argument.

2. Counsel state (pp. 6, 7 of their petition) that Todd and Talley agreed to have employees reinstated in Armour's employ and on its payroll, thereby assuring payment in full of the accounts out of continued earnings. The Circuit Court of Appeals in its opinion correctly sets forth Haberman's testimony on this point and concludes that the most that can be said of the testimony is that Todd and Talley agreed to keep the employees on the payroll, and if an Armour employee customer of bankrupt was dropped Todd and Talley would get him back on the payroll (pp. 241, 242 of opinion). This is entirely different from petitioner's claimed version. The fact that the court is correct can be verified from the record (R. 106, 109, 110.)

3. Counsel state (p. 7 of their petition) that Haberman did not guarantee the loans of the Credit Union and was not a co-maker. But the court found that the defendants claimed Haberman was a co-maker or guarantor on the Credit Union loans (Finding No. 16, R. 1603), and the Circuit Court of Appeals finds that the settlement of that dispute was one of the considerations for the making of the written agreement of Haberman of August 15, 1935, to pay the Credit Union defaulted loans. (R. 1950.)

4. Counsel (p. 7 of their petition) state that "when early in 1935 Armour & Company laid off many employees, collections out of wages dropped severely on Haberman's credit accounts and on the Credit Union's loans."

This is one of the points that the Circuit Court of Appeals held was disproved by actual documentary evidence introduced by plaintiff. Plaintiff's Exhibit 69, which was plaintiff's audit, showed collections of the Service Bureau for the periods involved as follows:

February 28, 1934 to March 1, 1935	$18,643.00
March 1, 1935 to Dec. 31, 1935	24,256.67

1936	42,256.67
1937	39,831.75
1938 to October 28	30,719.73

This same Exhibit shows the collections by weeks. Taking December, 1934, we find the highest collection $168.13 and the lowest $102.83, for January, 1935, the highest $124.66 and the lowest $109.42, and taking the crucial month of February, 1935, when Haberman testified that hundreds of Haberman's debtors were discharged, we find the highest amount collected was $98.86 and the lowest $87.20. With these small differences in collection by the Service Bureau, it was not possible that hundreds of Haberman's customers were laid off. It was because of Haberman's impeachment by his own written documents that the court found as it did.

5. On p. 7 of their petition counsel give their version of what they say Haberman's testimony was. They claim that this testimony bears on the question of duress. But this is incorrect because

(a) The testimony they quote (R. 164) refers to a conversation of Haberman which he testifies took place in March, 1935 (R. 164), and not in August, 1935, when the agreement of August 16 was signed.

(b) The testimony they quote (R. 174-5) is with reference to a conversation in the summer of 1936. (R. 174.)

(c) There is no reference in the testimony of Haberman (R. 164) to the agreement of August 16, but this testimony refers to an assignment to Todd and Talley of accounts receivable by Haberman made a short time after March 29, 1935 when Haberman signed a note to Todd and Talley for $13,678.00. The court found with reference to this assignment that Todd stated that "if Haberman refused

to sign said assignment, said Todd and Talley would stop collection on all of Haberman's Service Bureau accounts, knowing full well that Haberman would be forced out of business if the collections were stopped." (Finding No. 30, R. 1607.)

(d) The Circuit Court of Appeals in its opinion (R. 1948-1949) has set up accurately and fully all of the evidence on the question of duress. There is no foundation for counsel referring to testimony not connected with the question of duress with reference to the agreement of August 16, 1935.

6. On p. 9 of their petition counsel say that after the agreement of August 16, 1935, "no loans were made thereafter until January, 1936."

This is incorrect for the following reasons:

(a) The District Court found (Finding 27, R. 1605, 1606) that "In and about August, 1935, Todd, Talley, the Credit Union and the Service Bureau commenced to deduct money * * * to apply on defaulted Credit Union loans. * * * At about this time, Haberman consequently became short of money, and Todd and Talley commenced advancing him money on his promissory notes, as hereinafter set forth." So counsel's statement is at variance with this finding.

(b) Also in finding No. 28 (R. 1606) the court found "In the period from September, 1935 to May, 1936, the Credit Union made some additional loans to customers of Haberman." The finding also shows that in the loans of December, 1935, and March, 1936, Haberman guaranteed these loans by express guarantee.

(c) Haberman testifies (R. 290) that on August 17, 1935 (the day after the authorization of August 16 was signed) that he signed a note for $8600.88.

7. On the question of whether any money was received by Todd and Talley from the proceeds of Credit Union loans by false representations, the District Court found (Finding No. 25, R. 1605) that "one-half of the moneys which Todd and Talley deducted from the proceeds of the Credit Union loans made to *Haberman employees* was deducted and retained by them" etc. This finding could not be sustained for the following reasons:

(a) These moneys deducted were applied against defaulted Credit Union loans, so if the Credit Union was not liable, this finding could not stand.

(b) There was not a scintilla of evidence in the record that the Credit Union made any loans to *Haberman employees*, and there never was any contention that there were any such loans.

(c) Finding No. 25 was inconsistent with Finding No. 24 which found that the total amount of deductions made by Todd and Talley for the purpose of their assurance agreement for the entire period from February, 1934 to October 1, 1938, was $18,829.10, and of this sum the total amount deducted after March 1, 1935, was $16,945.53. (R. 1604.) This left a total of $1883.57 deducted by Todd and Talley for their supposed assurance agreement up to March 1, 1935, after which there were no further deductions for Credit Union loans, while in Finding No. 25, the court found that Todd and Talley had received $10,076.75 alone from Credit Union loans.

(d) This cause of action was barred by the Statute of Limitations. The cause of action could not have arisen later than March 1, 1935, as the court found that the amounts deducted by Todd and Talley were substantially all paid prior to March 1, 1935 (Finding No. 26, R. 1605).

This cause of action was never mentioned until set up in the amendment filed November 15, 1944, or over nine years from the cause of action date. The defendants pleaded the Statute of Limitations (R. 47).

8. The note for $10,670.00 which Haberman signed represented a settlement and full payment by Haberman of all claims of Todd and Talley. The parties treated the settlement as in full force and effect and Haberman testified he made payments on the note amounting to $1353.00 (R. 757). The court based its finding on the fact that Todd and Talley did not return some old notes, but these notes were not to be turned over to Haberman until Haberman brought in the contracts which were assigned under the settlement agreement (R. 1028).

9. On the finding of the court (No. 36, R. 1611) that Todd and Talley retained the difference between $26,408.36 (the face amount of the accounts) and the $18,073 which was paid by Talley, there was no allegation in the complaint or amendment with reference to this claim. Counsel for petitioner could not even argue this point in their brief filed in the Circuit Court of Appeals because no claim had been made in the District Court for same. In addition there was no record evidence that Todd or Talley collected any particular amount on these accounts. The District Court in effect treated Todd and Talley as an insurer of accounts which they purchased for 65c on the dollar, the same amount for which the plaintiff, as Trustee in bankruptcy of Haberman, sold other similar accounts to Todd and Talley under an order of the District Court in the bankruptcy case of Haberman (R. 404).

Reply to Reasons Relied on for allowance of the two writs.

1. When counsel say that "The scope of the review on appeals (* * *) from judgments based on findings of trial courts in trial without a jury in civil actions, which but for the Federal Rules of Civil Procedure would be actions at law, involves the interpretation of Rule 52 (a) and conflicting statutes governing relief on such appeals" (p. 12 of petition) their statement is inconsistent. By their assumption of a civil trial without the Federal Rules of Civil Procedure in existence, they assume there are no such Rules, and then say that a review of a case without these Rules involves an interpretation of one of the very Rules they assume is not in existence. What they probably mean to say (although we cannot be certain) is that the Act of 1934, which provided that this Court might prescribe rules so that there would be only one form of action in district courts, did not provide that this Court had any power under that Act to prescribe Rules which would affect procedure in circuit courts of appeal; that, therefore, Rule 52 (a) would be invalid as prescribing appellate procedure and not procedure in the district courts; that, therefore, circuit courts of appeal are bound to disregard all of the Rules of Civil Procedure, and when a civil action is there heard on appeal, such courts must not look to the one form of action procedure prescribed for district courts, but must determine whether the action was one at law or in equity, and upon such determination decide the appeal under the law in effect prior to the promulgation of the said Rules.

Manifestly, counsel are in error when they state that the first reason they give involves the interpretation of Rule 52 (a). Their contention must be that Rule 52 (a), as well

as all other Rules affecting appellate procedure are void. We, of course, deny that this contention has any merit or should even be considered by this Court.

2. Having assumed that Rule 52 (a) is invalid as applying to appellate procedure, counsel contend that the action here involved was an action at law, and that the Circuit Court of Appeals should have disregarded Rule 52 (a) and found that as this was a law action, that findings of fact made by the District Court where there is some evidence to support them could not be reviewed by the Circuit Court of Appeals. However, even if we assume that Rule 52 (a) is invalid, we maintain the action here involved was in equity and not at law.

3. Counsel's next reason is that, if we assume Rule 52 (a) is valid, that the interpretation and application of Rule 52 (a) by the Circuit Court of Appeals below is in conflict with the decisions of circuit courts of appeal for other circuits. This is not correct. There has been no conflict in any of the decisions of any of the various circuit courts of appeal with reference to the interpretation and application of Rule 52 (a).

4. Counsel's next reason is that the Circuit Court of Appeals has decided a question of the Illinois law of duress in conflict with applicable local decisions. This is incorrect. The Circuit Court of Appeals correctly applied the well settled law of Illinois on the question of duress.

5. The last reason assigned by counsel is that the Circuit Court of Appeals so far departed from the accepted or usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision. We, of course, maintain that the Circuit Court of Appeals correctly applied the law and procedure in this case.

Wherefore, respondents pray that the prayer of the petition for writs of certiorari in the two cases before the court be denied.

ARMOUR PLANT EMPLOYEES CREDIT UNION
ARMOUR PLANT EMPLOYEES SERVICE BUREAU
ANDREW A. TODD
CHELSEY H. TALLEY
Respondents.

By RAY E. LANE
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO WRITS OF CERTIORARI.

Additional Statement of the Case.

The facts set forth in the Opinion of the Circuit Court of Appeals and above in our Answer show the material facts and the material issues involved herein. We request the

court to consider the facts stated above as our additional statement of the case.

Answer to Specifications of Errors Urged by Petitioner.

(1) The Circuit Court of Appeals did not err in reversing the judgment of the District Court with directions to dismiss petitioner's action.

(2) The Circuit Court of Appeals did not err in not affirming the judgment of the District Court, and, also, did not err in reversing the judgment of the District Court.

ARGUMENT.

I.

Rule 52 (a) of the Federal Rules of Civil Procedure is not invalid.

We maintain that Rule 52 (a) of the Rules of this Court is not invalid. As reasons for our conclusion we submit as follows:

(a) It was provided in the enabling Act which authorized this Court to prescribe rules which would provide for a one form of action procedure in civil actions, that such united rules should not take effect until they should have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session. The present Rules were so submitted and Congress did not modify them in any manner, thus, in effect, approving them.

(b) The adoption by this Court of Rule 52 is a pronouncement by this Court that it had the power to prescribe such Rule, and amounts to a construction of the said Rule by this Court.

(c) This Rule "has the force of law". *Weil* v. *Neary*, 278 U. S. 160, 169.

(d) In the Notes of Advisory Committee on Rules (note under Rule 52, Title 28, p. 2640, United States Code), it is stated: "The provisions of U.S.C., Title 28, sec. 773 (Trial of issues of fact by court) and 875 (Review in cases tried without a jury) are superseded insofar as they provide a different method of finding facts and a different method of appellate review."

(e) The Federal Rules of Civil Procedure have been in effect since 1935 and since that time Rule 52 has been acted upon and considered in numerous decisions of circuit courts of appeal. During all that time its validity has never been questioned.

But assuming that Rule 52 is invalid as claimed by counsel, then they claim that circuit courts of appeal must not look to the form of action prescribed by the Rules, but such courts must ignore these Rules, apply the old procedure of two forms of action, and determine whether the cause of action in the district court was at law or in equity. They seek to apply such contention here, further contending that the present action although originally an action in equity, became an action at law because of an amendment made after the hearing of this cause had been completed.

Answering this further contention we maintain that

II.

The present action was an action in equity and has always continued as an equity action.

To the contention that the complaint as amended was only an action for a money judgment against the respondents and prior to the Federal Rules of Civil Procedure would have been an action at law, we maintain that such action was and always has been an action in equity. The reasons for our contention are as follows:

(a) The original complaint was entitled "Complaint for Accounting" (R. 2), and requested an accounting against the several respondents on four different causes of action, one against the Credit Union and three against Todd and Talley and the Service Bureau. An injunction

was also requested against Todd and Talley. (R. 11.) The relief being an accounting against several defendants on causes of action for which all of the defendants were not liable jointly, and, also, for an injunction, was an action in equity. Being an action in equity, petitioner could not after an accounting had been had and after several weeks of trial merely change "Complaint for Accounting" to "Complaint", and leave out the prayer for injunction (R. 1576) and make the action one at law.

(b) If the action had been one at law, prior to the Federal Rules of Civil Procedure as an action *ex contractu*, petitioner could not have joined the Credit Union, and Todd and Talley on four separate causes of action, on three of which the Credit Union was not liable, and on one of which Todd and Talley were not liable.

Adriatic Fire Ins. Co. v. *Treadwell*, 108 U. S. 361.
Kimmel v. *Shulz*, 1 Ill. 128.
Supreme Lodge A.O.U.W. v. *Zuhlke*, 129 Ill. 298, 303.
Imperial Hotel Co. v. *H. B. Claflin Co.*, 175 Ill. 119, 123, 124.

So that the action of petitioner, if instituted prior to the passage of the Federal Rules of Civil Procedure, could not have been maintained jointly as a law action against the Credit Union, the Service Bureau, and Todd and Talley.

(c) Prior to the passage of said Rules, several judgments against different defendants for different amounts on several causes of action, and a decree cancelling certain notes and directing Todd and Talley to deliver said notes up for cancellation could not have been legally entered in an action at law. It was only in an equity proceeding prior to the passage of the Rules, or under the Rules now in existence that such action could be taken by a district

court. When the several judgments were entered in this cause and the decree entered directing Todd and Talley to deliver said notes, the petitioner must have taken the position that the cause came under the Rules or was an action in equity. Either position is fatal to the position now taken, as petitioner would be estopped to take a different position in this Court.

If the action was one in equity then the findings of the trial judge could have been revised if they were against the weight of the evidence. In the case of *Morley Co.* v. *Md. Casualty Co.*, 300 U. S. 185, this court said (p. 191):

> "Findings may be revised at the instance of an appellant, if they are against the weight of the evidence where the case is one in equity."

See also, *Harkin* v. *Brundage*, 276 U. S. 36.

III.

The application of Rule 52 (a) by the Circuit Court of Appeals below is not in conflict with decisions of circuit courts of appeal for other circuits.

Under this point counsel for petitioner claim that the Circuit Court of Appeals (under decisions in other circuits) had authority to determine whether there was any evidence to support the findings of the District Court but did not have authority to hold that a finding of the District Court was clearly erroneous, if there was any evidence to support the questioned finding. In making this point counsel have not fully explained the record situation so we set forth the pertinent facts with reference thereto.

There are pending before this Court two cases, No. 321, with reference to the Credit Union, and 322, with reference to the Service Bureau, Todd and Talley. The reason for this is because the Credit Union appealed separately from the other respondents. The two appeals were consolidated in the Circuit Court of Appeals (R. 1937) which rendered its decision covering the two appeals. Therefore, these petitions should be considered separately where the points made warrant such separate consideration.

A. *With reference to the Credit Union the Circuit Court of Appeals only held that there was no evidence to support a finding of duress, and, therefore, the point here made is not applicable to the petition as to the Credit Union.*

In deciding that there was no evidence showing duress, the Circuit Court of Appeals in its opinion, the court said (R. 1950):

> "Construing the testimony most favorably in support of this finding, as we are required to do, we are persuaded that there is no evidentiary support for a finding of duress."

and further said (R. 1950):

> "Equally conclusive on this issue of duress is the failure of plaintiff to seasonably seek avoidance of the agreement because of the alleged duress." Citing *Barnette* v. *Wells Fargo Nat. Bank*, 270 U. S. 438.

On the question of duress, that court did not weigh the evidence and pass upon the credibility of the witnesses; that court held with reference to the Credit Union that there was no evidence to support the finding of duress. Without a finding of duress the contract of August 16, 1935, stood and there could be no recovery by the plaintiff.

So that insofar as the Credit Union is concerned, the point here made by counsel does not apply to the petition for a writ in the Credit Union case, and even according to counsel's own statements under this heading the Circuit Court of Appeals was justified in passing on whether there was evidentiary support for the finding of duress, and no circuit court of appeal has ever held that such question could not be so passed on by such court. No writ should be granted in the Credit Union case on this question.

B. *With reference to the other respondents in Case 322, the Circuit Court of Appeals held that the finding of a guarantee was not sustained by the evidence so that that question is not involved under this heading.*

With reference to the finding of a guarantee by Todd and Talley under the so-called assurance agreement, the court said (R. 1952):

> "Accepting Haberman's testimony in full, it falls short of an agreement to guarantee payment of all the Armour employees' accounts. The most that can be said of it is that T and T agreed to keep the employees on the payroll and if an Armour employee customer of bankrupt was dropped T and T would get him back on the payroll. This agreement was not a guarantee to pay the accounts in full. We conclude, therefore, that the finding is unsupported by the evidence."

Under the agreement as found by the Circuit Court of Appeals, there is no proof by the petitioner of what particular debtors did not pay their accounts to Haberman, nor is there any proof of the amount of the default of each particular debtor. In the absence of such proof there could properly be no finding of any particular amount against Todd and Talley. The District Court entered its finding on the basis of a guarantee, but in the absence of such a guarantee, the Circuit Court of Appeals might well

have reversed the judgment because there was no proof of damage.

C. *With reference to the making of the supposed agreement to keep the employees on the Armour payroll, the Circuit Court of Appeals held that the finding of the District Court on this question was clearly erroneous because the testimony of Haberman on this question was contrary to all of the writings introduced in evidence, and was contradicted by his own statements and by common sense. In so acting, the Circuit Court of Appeals did not construe Rule 52 (a) differently from constructions placed on such rule by the decisions of other circuit courts of appeal.*

On page 243 of its opinion the Circuit Court of Appeals states that "it is impossible to find that an agreement was reached" etc. and base their holding on the fact that the written agreements introduced in evidence by petitioner and all of the other facts apparent in the record cannot be reconciled with the existence of such an agreement by Todd and Talley. Rule 52 (a) was prescribed for just such a case as we have before us, as the finding of the District Court on the question of the making of such an agreement was "clearly erroneous".

Rule 52 (a) was applied in *Richardson* v. *United States*, 145 F. 2d 764 cited by counsel. The court stated that a finding will not be disturbed or overturned if supported by substantial evidence, and then found that "There is no substantial evidence upon which to predicate a judgment." So that the court in that case acted in the same manner as in the present case.

In *U. S. Guarantee Co.* v. *Colonial Oil Co.*, 145 F. 2d. 496, the court held that the findings of the district court were

supported by substantial evidence. The court held to the same effect in *Ake* v. *Chancey*, 149 F. (2d) 310.

None of the above cases in the Fifth Circuit support the proposition set forth by counsel on p. 18 of their brief that the decisions in the Fifth Circuit "permit only a review of whether there be evidence to support the findings." Counsel is clearly in error in making this statement as a reading of the cited cases will show.

In the case of *Kansas City Public Service Co.* v. *McMullin*, 142 F. (2d) 116, the court said that it should ascertain whether there was substantial evidence to sustain the judgment of the trial court.

In the case of *Federal Deposit Ins. Corp.* v. *Deaton*, 105 F. (2d) 677, the same language that the findings are sustained by "substantial evidence" was used by the court.

So that the cited decisions in the Tenth Circuit are likewise not in accordance with what counsel claim they decide.

The Third Circuit cases of *Floridin Co.* v. *Attapulgus Clay Co.*, 125 F. (2d) 669, and *Plack* v. *Baumer*, 121 F. (2d) 676, likewise refer only to the fact that the trial court's fact findings, which are supported by substantial evidence, will not be disturbed on appeal.

In the case of *Corbett* v. *Halliwell*, 123 F. (2d) 331, the court said that it was satisfied that the findings of fact were not "clearly erroneous", but were supported by substantial evidence.

So that in no case cited by counsel is there any statement by the courts that under Rule 52 a circuit court of appeal is only permitted a review of whether there is evidence to support the findings.

Various circuit courts of appeal in referring to the language of Rule 52 have used the language "clearly errone-

ous" and "not supported by substantial evidence", as above set forth, "a demonstration of plain mistake", *In re Avery*, 114 F. (2d) 768, 770 (C.C.A. 6) "where no clear error appears", *Brooks* v. *Driscoll*, 114 F. (2d) 426, 429, (C.C.A. 3).

Some courts have defined what is "clearly erroneous". In the case of *Gasifier Mfg. Co.* v. *General Motors Corporation*, 138 F. (2d) 197, (C.C.A. 8), the court said (p. 199):

> "A finding of fact of a district court is not clearly erroneous unless it is (1) unsupported by substantial evidence, (2) contrary to the clear weight of the evidence, or (3) induced by an erroneous view of the law". (Citing cases)

In the case of *United States* v. *62 Packages*, etc. 142 F. (2d) 107 (C.C.A. 7), the court said (p. 109):

> "Obviously the finding should not be set aside unless clearly against the weight of the evidence. Rule 52 (a) Rules of Civil Procedure, 28 U.S.C.A. following Section 723"; (citing a number of other authorities).

To the same effect are

Cleo Syrup Corporation v. *Coca Cola Co.*, 139 F. (2d), 416, 418, (C.C.A. 8).

Sears, Roebuck & Co. v. *Tatge*, 140 F. (2d), 395, (C.C.A. 8).

In the case of *Harkin* v. *Brundage*, 276 U. S. 36, this Court refused to accept a finding of a district court, where the agreed stenographic report and other circumstances showed it to be "clearly erroneous".

There is no real conflict as between the language used by the various courts in referring to Rule 52. The purpose and intent is always that the Circuit Courts of Appeal decide whether the findings are or are not "clearly erroneous". In the present case the Circuit Court of Appeals held that the finding of the District Court as to the making of

the "assurance agreement" was "clearly erroneous", and it matters not what language they used in arriving at that decision.

IV.

The Circuit Court of Appeals did not decide the question of duress contrary to applicable Illinois decisions.

The law in Illinois on the question of duress is set up in the case of *Illinois Glass Co.* v. *Chicago Tel. Co.*, 234 Ill. 535, where the court said (p. 543):

> "In order to render a payment compulsory such a pressure must be brought to bear upon the person paying as to interfere with the free enjoyment of his rights of person or property, and the compulsion must furnish the motive for the payment sought to be recovered. Proof that one party is under no legal obligation to pay the money and that the other has no right to receive it is of no consequence unless the payment was compulsory, in the sense of depriving the one making the payment of the exercise of his own free will".

To the same effect are *Ill. Merchants Trust Co.* v. *Harvey*, 335 Ill. 284, 291; *Graves* v. *Farmer's State Bank*, 368 Ill. 35, 47; *Bryan* v. *Pilgrim Nat. Life Ins. Co.*, 294 Ill. App. 356, 360, 361; *Western & Southern Life Ins. Co.* v. *Brueggeman*, 323 Ill. App. 173, 178.

In making the statement that the Circuit Court of Appeals decided the question of duress contrary to applicable Illinois decisions, therefore, counsel are in error. Their real contention is that the Circuit Court of Appeals erred in holding that the testimony of Haberman did not amount to duress. The courts of Illinois have consistently adhered to the law as above set forth, and have announced no decision contrary to the law as found by the Circuit Court of

Appeals in this case. There are a number of Illinois cases, in some of which the courts have found that there was duress and in a number of others that there was no duress, but each case was decided on the particular facts involved, the law on the question being well settled.

The testimony of Haberman as set forth in the opinion of the Circuit Court of Appeals (R. 1948-1949) does not amount to duress in law. Haberman says that Todd said at the time he signed the document "If you don't sign that document, we are not going to give you any money, and we are through with you."

So he signed and in signing there certainly was no duress. The Illinois law is plain on that question as Haberman exercised his free will to draw up the paper in his own handwriting and acted on it for over three years doing business with Todd and Talley, and making loans from them.

Counsel cite certain Illinois cases in support of their contention. We cite a few Illinois cases to show that counsel are in error in their contention.

In the case of *Stover* v. *Mitchell*, 45 Ill. 213, the court held that the levy of an execution against A on real estate of B, does not constitute duress against B, so that a payment made to release the levy was a voluntary payment and could not be recovered.

In *Rendleman* v. *Rendleman*, 156 Ill. 568, threats of imprisonment and criminal prosecution were held not to be duress.

Other cases in Illinois where it has been held that threats to take action, to take criminal action, business emergencies, etc. do not constitute duress are as follows:

Baldwin v. *Murphy*, 82 Ill. 485.

Hart v. *Strong*, 183 Ill. 349, 355.

Bonney v. *Bonney*, 237 Ill. 452, 460, 461.
Carlson v. *Koerner*, 129 Ill. App. 168, 172.
Keeley v. *Pope*, 160 Ill. App. 492, 496.

The case of *In re Prima Co.*, 98 F. 2d. 952, 965 (C.C.A. 7) decided question of duress similar to the one in the present case and that decision was made under Illinois law.

Also, the law in Illinois on the question of duress is the same as in other jurisdictions. *French* v. *Shoemaker*, 14 Wall. 314, 333; *Lyon* v. *Huckabee*, 16 Wall. 414, 431; *Silliman* v. *United States*, 101 U. S. 465; *Stott Realty Co.* v. *Detroit Sav. Bank*, 274 Mich. 80; *Wasserstein* v. *Beim*, 294 N. Y. S. 439; *First Nat. Bank* v. *Multnomak Lbr. & Box Co.*, 125 Ore. 598; *Dick* v. *Marx & Rawolle*, 4 F. (2d) 879, (D.C.App.).

In the case of *Illinois Merchants Trust Co.* v. *Harvey*, 284 Ill. App. 498, the court held that payment of Federal income taxes under a lease was made under duress because of a threatened forfeiture of the lease, but the Illinois Supreme Court, 335 Ill. 285 (cited by counsel) reversed that decision and held that the plaintiff had an adequate remedy in equity to secure the aid of that court to prevent the threatened forfeiture and because such action was not taken, the payment was voluntary and was not made under compulsion or duress. And that decision is applicable here because Haberman had plain remedies to which he might have resorted. He elected to continue to do business with Todd and Talley and made loans from then over a period of years. His failure to resort to any legal action and his continuance of such conduct of over three years stamps his actions in signing the agreement of August 16, 1935, and the payments thereunder as free of compulsion.

To the same effect is *Wourdach* v. *Becker*, 55 F. 2d. 840, 842 (C.C.A. 8)

Counsel fail to mention other legal questions with reference to the claimed duress which we state as follows:

(a) An agreement procured by duress is merely voidable at the election of the person upon whom the duress was practiced.

Barnette v. *Wells Fargo Nat. Bank*, 270 U. S. 438, 444.

Eberstein v. *Willets*, 134 Ill. 101, 108.

(b) A party who complains of duress must act promptly or his right to disaffirm is lost.

Barnette v. *Wells Fargo Nat. Bank*, 270 U. S. 438, 444, 446.

Andrews v. *Connolly*, 145 Fed. 43, 46, (D. C. Colo.).

Walker v. *Alamo Foods Co.*, 16 F. (2d) 694, 697, (C.C.A. 5).

Eberstein v. *Willets*, 134 Ill. 101, 108.

Bogue v. *Franks*, 199 Ill. 411, 418, 419.

Haberman testified after all payments were made to the Credit Union that he allowed the payments to be made because he wanted to stay out of bankruptcy (Tr. 238).

(c) Even if there is no consideration for a new agreement, if it has been executed and by means thereof the defendant has been led into a line of conduct which is prejudiced to his interest, an equitable estoppel arises against recovery by the plaintiff.

White v. *Walker*, 31 Ill. 422, 437.

Worrell v. *Forsyth*, 141 Ill. 22, 30.

We distinguish a few of the cases cited by counsel as follows:

In the case of *In re Prima Co.*, 98 F. (2d) 952, the court distinguishes *Cook* v. *Wolf*, 296 Ill. 27, cited by counsel as follows (p. 965):

"It is clear that there were both duress and violation of confidential relationship, and the ruling was in no

wise inconsistent with the principles enunciated in the Illinois cases hereinbefore cited."

In *Harris* v. *Flach*, 289 Ill. 222, conservatorship proceedings were filed against Mrs. Harris which averred that she was a distracted and feeble-minded person. The court held that she was under such fear because of these proceedings that it affected her mind, and that she signed the trust deed in question because of such fear.

Slade v. *Slade*, 310 Ill. App. 77, was a similar case where advantage was sought to be taken of a woman 70 years of age by fear and intimidation.

Under the above, the Circuit Court of Appeals did not disregard the law of Illinois. With reference to counsel's statement as to the facts concerning the duress, their statement is manifestly incorrect. For example, they state that "They had no right to interfere with his independent collection from the employer on wage assignments." An examination of the evidence as set forth by the Circuit Court of Appeals, shows that no such statement is justified. With reference to the loans which were made, counsel under this heading make the same mis-statement that they did under their so-called "Summary of the Matter Involved". Our answer on the question of the loans made under point 6, pp. 2-8 of our Answer herein.

V.

The Circuit Court of Appeals did not so far depart from the accepted or usual course of Judicial Procedure as to call for an exercise of this Court's Power of Supervision.

1. Under this heading counsel continue their practice of making mis-statements as to the record. When they make the statements on p. 20 of their brief with reference to certain findings, they well know that the Circuit Court

of Appeals held that all findings with reference to duress were invalid. Also, they know that finding No. 30 refers to the assignment made in June, 1935, as we above pointed out under our Answer (p. 5).

Also, they say that there was no consideration for the execution of the agreement of August 16, 1935. This question is adequately disposed of by the Circuit Court of Appeals which stated as follows:

> "Lack of consideration for this agreement here asserted by appellee is hardly worthy of separate consideration in this opinion. A valid consideration is found in (a) extension of existing credit and the making of additional loans, and (b) the settlement of the dispute over bankrupt's liability in addition to that of his customers." (R. 1950.)

Counsel also say (p. 21 of their brief) that the Circuit Court of Appeals ignored Haberman's testimony at pages 164-165, 174-175, and 436 of the transcript. We have already pointed out above that the testimony referred to is not applicable on the question of duress with reference to the August 16, 1935 agreement (see pp. 5, 6 of our Answer herein).

2. On the claim that the inconsistent statements of the bankrupt made before the referee were not admissions binding on the petitioner as trustee, neither we nor the Circuit Court of Appeals have ever taken such position. They were admissible to show Haberman's conduct and thoroughly impeach his testimony and show that in connection with all of the documents in the case that Haberman's testimony could not be the basis of a finding and any finding made on such a condition of the record would be "clearly erroneous". However, the conflicting story of Haberman was only one of the elements used by the court in arriving at its conclusion.

3. On the claimed question as to the other claims raised by counsel on p. 23 of their brief we have fully answered all of said contentions under our Answer above (Paragraphs 7, 8 and 9, pp. 7 and 8 of our Answer).

In conclusion counsel plead for a recovery for trustees in bankruptcy. They neglect to inform the court that the amount of Haberman's creditors is but $11,147.34 (Tr. 296, 277). After paying these claims in full and all expenses the remainder will go to Haberman. As the judgment is about $105,000.00 Haberman would receive about $70,000.00 if the judgments in this case are allowed to stand. Haberman would receive this considerable sum as a reward for his testimony in this case. It shocks the moral sense to realize that the unsupported testimony of Haberman given eleven years after the events he relates may place a fortune in his hands when we realize that all of his testimony he gave in this case was directly contrary to the testimony he gave at another hearing, and when his present testimony is impeached by every written document and by every act and declaration he made over the eleven years prior to the trial. It is no wonder that the Circuit Court of Appeals found that it was impossible to sustain a finding based on Haberman's testimony.

Counsel are not really pleading for trustees in bankruptcy, it is for Haberman that they are really pleading.

CONCLUSION.

Counsel for petitioner have raised a feigned issue with reference to the validity of Rule 52, and have misstated the facts with reference to a supposed divergence in the construction of Rule 52 by various Circuit Courts of Appeal. These tactics are employed in a palpable endeavor to inject a federal question into this case when no such question is really here involved.

We submit that no question is presented to this Court which justifies the issuance of writs of certiorari under Rule 38 (5) of this Court, or any of the other rules governing the granting of such writs. The petition should, therefore, be denied.

Respectfully submitted,

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Chicago, Illinois.
Counsel for Respondents.

HARRY A. BIOSSAT,
JOSEPH Z. WILLNER,
EUCLID L. TAYLOR,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 321, 322

JOHN H. CHATZ, TRUSTEE IN BANKRUPTCY OF HOWARD HABERMAN, DOING BUSINESS AS THE CLUB STORE AND MORTON CLOTHIERS, BANKRUPT,

Petitioner,

vs.

ARMOUR PLANT EMPLOYEES CREDIT UNION, A CORPORATION,

Respondent.

JOHN H. CHATZ, TRUSTEE IN BANKRUPTCY OF HOWARD HABERMAN, DOING BUSINESS AS THE CLUB STORE AND MORTON CLOTHIERS, BANKRUPT,

Petitioner,

vs.

ANDREW A. TODD, CHELSEY H. TALLEY AND ARMOUR PLANT EMPLOYEES SERVICE BUREAU, A CORPORATION,

Respondents.

PETITION FOR REHEARING.

JOSEPH ROSENBAUM,
Counsel for Petitioner.

HARRY H. RUSKIN,
JEROME S. WALD,
Of Counsel.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Respondents.

PETITION FOR REHEARING.

Now comes John H. Chatz, trustee in bankruptcy of Howard Haberman, doing business as The Club Store and Morton Clothiers, bankrupt, by Joseph Rosenbaum, his counsel herein, and prays that a rehearing be granted, and

that on such rehearing the court vacate its order, entered in this cause on the 14th day of October, 1946, denying his petition for writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, and enter an order either granting the writs of certiorari as prayed in his petition for said writs, or in the alternative, granting the writs of certiorari limited to the first question presented in his said petition for said writs of certiorari.

In support of this petition for rehearing the following is respectfully submitted.

1. The findings of fact of the district court support its money judgment for petitioner. The reversal in the court below by a divided court was solely because the court believed that the *evidence* did not sustain the facts as found. Except for the authority assumed by it under Rule 52(a) of the Federal Rules of Civil Procedure for the District Courts of the United States, the court below had no authority under the acts of Congress on the subject of review in the circuit courts of appeals to determine other than whether the facts as found supported the judgment. *State Farm Ins. Co.* v. *Coughran,* 303 U. S. 485, 487.

2. The first question in the petition for writs of certiorari, whether Rule 52 (a) for the district courts supersedes the statutes denying the authority of the circuit courts of appeals to reverse judgments of the district courts for errors in fact, is dispositive of the cause at bar without the need for any consideration of the evidence or the merits of this cause. If the question is answered in the negative, that no change in appellate authority has been effected by the rule, the judgment of the court below (except possibly as to interest alone) would without more have to be reversed and that of the district court affirmed, as the findings of fact do support its judgment.

3. If this court will see fit to grant and limit certiorari

to the first question presented, it can set at rest a question lying at the very foundation of federal appellate practice,—one of vital national importance affecting the administration of justice by an important branch of the judiciary and of substantial professional interest to members of the bar that, in their representation of litigants in the district courts, they may properly consider the desirability and effect of a waiver of a trial by jury in the event of a review of the judgment of the district court. The subject was not free from doubt at the very inception and creation of the Federal Rules of Civil Procedure, as is evidenced by the Report of the Advisory Committee on Rules for Civil Procedure, April 1937, page 149.

As pointed out above, a decision on this question alone can dispose of this cause without going beyond the findings of the district court, and will serve the salutary purpose of determining the status in the circuit courts of appeal of a review which, although in form an appeal, is nonetheless, by express statutory mandate, in substance a writ of error with all the limitations of such a writ.

Historically, there could be no review by writ of error of the judgment of a district court in law actions tried to the court without a jury. Such trials are held not to be judicial acts but arbitrations and therefore not reviewable on such a writ. *Campbell* v. *Boyreau,* 21 How. 223, 226-7.

It was only by virtue of the Act of March 3, 1865, ch. 86, 13 Stat. 501, that the reviewing court was empowered to review the judgments in such cases on writs of error; and the statute granting the authority imposed also the limitations that the findings of the trial court have the effect of a jury's verdict and that when the findings are special the review may extend to the determination of whether the findings of fact support the judgment. Reversal upon a writ of error for any error in fact was long prohibited by statute.

This statute was incorporated in the U. S. Revised Statutes and in the U. S. Code, Title 28, sections 773, 875 and 879 (quoted in Appendix, at pages 28, 29, to Petition for Writs of Certiorari), and are still the law but for the assumed conflict of Rule 52(a).

It is submitted that the writ of error in substance and with its limitations are still with us. U. S. Code, Title 28, sections 861a and 861b, Act of January 31, 1928, ch. 14, 45 Stat. 54, section 1, and section 2 as amended by Act of April 26, 1928, ch. 440, 45 Stat. 466. The jurisdiction of the circuit courts of appeals under section 128 of the Judicial Code as amended by the Act of February 13, 1925, ch. 229, 43 Stat. 936, and the statute creating it, Act of March 3, 1891, ch. 517, 26 Stat. 826, sections 2, 6 and 11, extends to writs of error (now in the form of an appeal) in accordance with the provisions of law regulating the method and system of review through such writs.

Upon such an appeal there may not be any reversal for errors in fact. This limitation, inherent in the review on a writ of error, is preserved on this appeal by U. S. Code, Title 28, section 861b. Whatever the desirability for greater review, the circuit courts of appeals are forbidden to reverse for errors in fact on the appeals substituted for writs of error over which jurisdiction has been vested in them; and this cannot be enlarged by a rule promulgated for the district courts.

The findings of the district court being adequate to support its judgment, the court below had no authority to reverse it for error in fact. Rule 52(a) cannot enlarge this limitation upon the court below in its review under an appeal pursuant to U. S. Code, Title 28, sections 861a and 861b.

Many cases, in substance actions at law, are being tried under the Federal Rules of Procedure in the district courts

and will be taken to the circuit courts of appeals for review as authorized by said sections 861a and 861b. It is of tremendous importance to litigants to know their rights with respect to appeals and the authority of the circuit courts of appeals, that their cases may be properly considered, presented and tried, and they be able to weigh and determine whether or not a jury trial should be waived, in the light of the right of the reviewing court to reverse for errors in fact and its not having the benefit of the personal observation of the witnesses and parties testifying at the trial.

It is therefore prayed that a rehearing be granted, and that on rehearing an order be entered at least granting the writs of certiorari as prayed by petitioner limited to the first question presented in his petition for said writs.

JOHN H. CHATZ, trustee in bankruptcy of Howard Haberman, doing business as The Club Store and Morton Clothiers, bankrupt,

Petitioner,

By JOSEPH ROSENBAUM,
Counsel for Petitioner.

HARRY H. RUSKIN,
JEROME S. WALD,
Of Counsel.

I, JOSEPH ROSENBAUM, counsel for the petitioner herein, due hereby certify that the foregoing petition for rehearing is presented in good faith and is not interposed for delay.

JOSEPH ROSENBAUM.